

Service Date: September 25, 1987

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Application)	TRANSPORTATION DIVISION
of SAM MERRICK AND BOB PITCHER,)	
A PARTNERSHIP DBA ERRANDS EXPRESS,)	DOCKET NO. T-9048
Billings, Montana, for a Class B)	
Certificate of Public Convenience)	ORDER NO. 5781a
and Necessity.)	

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ORDER ON RECONSIDERATION

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On July 13, 1987, the Commission denied Applicants' request for a Certificate of Public Convenience and Necessity in Order No. 5781. Applicants' have moved for reconsideration of that Order on the basis that 1) their market survey establishes a need for the proposed service, 2) the Commission misunderstood the significance of the survey findings, and 3) other witness testimony supported the application. Upon further consideration, the Commission reaffirms its Order for the reasons set forth below.

Market Survey

Applicants initially contend that their market survey was

better than any evidence produced by the Protestant concerning the size and availability of the market for delivery services in Billings. It must be noted, however, that the burden of proof regarding need for additional services is on Applicants.

The Commission found in Order No. 5781 that Applicants' market survey had not demonstrated any dissatisfaction with existing delivery services. In addition, the survey was found to be too hypothetical and speculative. Applicants respond by citing the percentage of survey respondents who claimed they would use delivery services for certain types of deliveries. Simply because those types of needs may be recurring, however, does not indicate the frequency with which delivery services would actually be demanded.

Applicants list the advantages of having a delivery service available. The Commission does not doubt that these advantages could be proven in certain instances. Again, however, this begs the question of whether or not a need for the proposed service exists.

Applicants correctly point out that market surveys are a common decision making tool for businesses. It must also be noted, however, that businesses make their decisions based largely on competitive factors, and not on the public convenience and necessity. Except for certain circumstances not found in this case, the Commission may not inject competition into its consideration of public convenience and necessity.

As a practical matter, Applicants claim that the Com-

mission's rejection of market surveys will create an entry barrier which can be met by only the most "well-heeled forces in the market". The Commission disagrees. An adequately prepared market survey may well cost more than the cases which the Commission has found in the past to support the grant of new operating authority.

The Commission has not placed an insurmountable burden on applicants seeking new operating authority.

Significance of Survey Findings

Applicants contend that the Commission misstated their position to be that the public would have a better chance to regularly obtain prompt service and that existing carriers have an obligation to advertise their services. The Commission believes that these contentions were either explicit or implicit in the Applicants' proof and arguments.

Applicants' Brief in Support of Application states at page 8 that "having two such delivery services available will mean that the public will have a better chance to regularly obtain prompt service." As stated in Order No. 5781, the Commission believes that this logic begs the question of whether existing services are inadequate. The Commission previously found that the record does not support a conclusion that existing services are inadequate. This proof must come from individual shipper testimony, since the market survey was found to be an inadequate basis for proving public convenience and necessity.

The contention that existing carriers have an obligation to advertise their services is implicit in Applicants' use of a market survey to support the need for new services. The market survey does not show that users of the existing delivery services are dissatisfied with those services. It shows that a certain percentage of the population is unaware of the availability of

delivery services. Since these people may use delivery services, Applicants contend that their lack of awareness suffices to establish the need for additional delivery services. If this is the case, then existing carriers have some obligation to advertise their services. The Commission believes that there is some such minimal obligation. As stated in Order No. 5781, this minimal obligation is met by advertising in the telephone directory Yellow Pages.

Testimony of Witnesses

The Commission believes that its Order No. 5781 accurately summarizes the testimony of witnesses appearing in this docket. This testimony did not support a finding of unmet need for the proposed services. Moreover, this testimony cannot corroborate the findings of Applicant's market survey, since the market survey itself did not establish an unmet need for services.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, MCA.

2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter. 69-12-322, MCA.

3. An applicant for a certificate must demonstrate that public convenience and necessity require authorization of the proposed service, Section 69-12-323, MCA. Public convenience and necessity is established where there is a public need for service, where existing carriers cannot fill the demonstrated need, and where the proposed service will not endanger or impair existing

carriers contrary to public interest. Pan American Bus Lines Operation, 1 M.C.C. 1901 (1936). The Applicant has not sustained its burden to show that public convenience and necessity would require that the authority as applied for be granted.

4. The transportation service currently being furnished is adequate to fulfill current and reasonably foreseeable public demand.

5. After hearing upon the application and after giving consideration to existing transportation services, the Commission concludes from the evidence that public convenience and necessity do not require the authorization of the proposed service.

ORDER

NOW THEREFORE IT IS ORDERED that the Applicant's Motion for Reconsideration in Docket No. T-9048 be DENIED.

Done and Dated this 21st day of September, 1987 by a vote of 4-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

JOHN B. DRISCOLL, Commissioner

HOWARD L. ELLIS, Commissioner

TOM MONAHAN, Commissioner

ATTEST:

Ann Purcell
Acting Secretary

(SEAL)

NOTE: You may be entitled to judicial review in this
 matter. Judicial review may be obtained by filing a
 petition for review within thirty (30) days of the
 service of this order. Section 2-4-702, MCA.